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FILED
AUG 18 1958
JAMES R. BROWNING, Clerk

No. 207

In the Supreme Court of the United States

OCTOBER TERM, 1958

LEE ROY GRANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 15–17) is reported at 255 F. 2d 341.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1958 (R. 184). A petition for rehearing was denied on June 26, 1958 (R. 198). The petition for a writ of certiorari was filed on July 23, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the district court erred in admitting evidence of an offense which was not alleged in the indictment but which was intimately related to an alleged offense and showed guilty knowledge.

3. Whether the instructions, to which petitioner did not object, were adequate.

STATEMENT

A six count indictment filed in the United States District Court for the Western District of Kentucky charged petitioner with receiving and concealing six stolen automobiles moving as interstate commerce, in violation of 18 U. S. C. 2313 (R. 38–40). After trial before a jury he was found guilty on counts 4–6 (R. 182) and not guilty on the first three counts. On September 10, 1957, petitioner was sentenced to two years imprisonment for each of the three offenses of which he was convicted, the sentence to run concurrently (R. 41–42). On appeal, the convictions were affirmed *per curiam*.

1. Petitioner stipulated that all six automobiles were stolen, traveling in interstate commerce, and received by petitioner on or about the dates alleged. Only the issue of petitioner's knowledge of their stolen character was contested (R. 53). On this issue the evidence supporting counts 4–6 may be summarized as follows:

About January 1953, Rufus Owen Hesson and Orrin Wright began stealing automobiles on a partnership basis (R. 61, 64, 74–75). Hesson usually stole the cars and Wright disposed of them in a five-state area (R. 61, 89). Prior to January 1954, Hes-

son and Wright went to petitioner's used car lot in Madisonville, Kentucky, to arrange to sell some stolen automobiles (R. 61, 74, 126). Hesson remained in the car while Wright talked to petitioner. Hesson had no actual knowledge of what was said (R. 84–85).[1]

In January 1954, Hesson stole a 1953 Chevrolet in Evansville, Indiana, and took it to Madisonville, Kentucky (R. 68). He told petitioner that he intended to change the engine numbers and asked if petitioner had some place where Hesson could do the work. Petitioner took Hesson to a private garage in a residential district of Madisonville and connected a power cord which supplied current for the electric drill which Hesson used in making the alteration. After changing the motor numbers, Hesson took the vehicle back to the used car lot and received payment from petitioner (R. 69–70, 78–80, count 5).

In March 1954, Hesson stole a 1953 Chevrolet coupe in Indianapolis, Indiana, and took it to Madisonville, Kentucky. He left the automobile either at petitioner's lot or at petitioner's motel, a few blocks away. Hesson received his share of the proceeds from that sale from Wright, the usual intermediary (R. 71, count 6).

Sometime between May 19, 1955, and August 16, 1955, Hesson stole a 1955 Chevrolet sedan in Evansville, Indiana, and took it to Madisonville, Kentucky. He left it behind petitioner's motel at night and later received his payment from Wright (R. 68, count 4).

Hesson testified that the house where he changed

[1] Wright was in a federal penitentiary for car theft at the time of trial and did not testify (R. 56–57).

the motor numbers was of frame construction, located on the right-hand side of the street, and grouped with several other houses just outside of the town (R. 93, 98). The driveway to the garage was graveled and the garage itself was larger than a one-car garage (R. 96).

There was testimony from a local resident who had been employed by petitioner (R. 98–99) that petitioner had owned a home on the right-hand side of the street in "the Boggess Addition" and that there was a gravel driveway on the premises leading to a two-car garage (R. 105–106). The witness did not know whether or not petitioner owned this home as early as 1954, but the previous owner, Charles Favors, was a friend and employee of petitioner in 1954 (R. 99, 102–103, 106). On three or four occasions in the summer of 1955, or perhaps 1954, the witness saw a person named Skinner Wright at petitioner's motel or office, and once petitioner asked the witness to leave petitioner's office so that petitioner could talk to Wright in private (R. 100). Charles Favors testified that he had owned the house in the Boggess Addition in 1954, and that petitioner purchased it from him in April 1955. So far as he knew, his garage had not been used as a place to work on an automobile in 1954 (R. 159–161, 163).

Petitioner testified that he had purchased the three automobiles from different Alabama used car dealers at different times. In each instance the title papers appeared to be in order and he did not know that the vehicles had been stolen (R. 136–140). Although he knew Skinner Wright, and had purchased jewelry

from him, he had never agreed to sell stolen automobiles to be supplied by Wright (R. 130).

2. The first count in the indictment, on which petitioner was acquitted, charged that he had received and concealed a stolen 1954 Oldsmobile sedan between August 2, 1954, and November 23, 1954 (R. 38).

At the trial, Hesson testified that, early in 1954, he had stolen a 1953 Cadillac in Vincennes, Indiana, altered the motor number, delivered the automobile to petitioner, and received payment from Wright. Later, petitioner complained to Hesson that one number had not been changed, and returned the Cadillac to Hesson. Hesson changed the number which he had not previously altered, but could not re-deliver the automobile to petitioner because Hesson permitted another person to use the vehicle and the other individual was apprehended with the Cadillac. Since this left Hesson indebted to petitioner, Hesson stole the 1954 Oldsmobile described in count 1 in Tampa, Florida, and delivered it to petitioner as a partial replacement for the Cadillac (R. 63–67). Defense counsel objected to testimony concerning the Cadillac automobile on the ground that it was not set out in the indictment (R. 63).

ARGUMENT

1. In this case the single evidentiary issue was clear-cut. If Hesson, an admitted car thief, was to be believed, then petitioner had knowingly received stolen automobiles. Petitioner denied that he had ever known or dealt with Hesson, but the jury chose not to believe him as to counts 4–6. Petitioner's attack on the evidence, based on the assertion that his

testimony was entitled to credit and Hesson's was not (Pet. 8–10), presents no question for review by this Court. The uncorroborated testimony of an accomplice is enough to sustain a conviction, *Caminetti* v. *United States*, 242 U. S. 470, 495. Here Hesson was corroborated in part by other testimony showing that his recollection was sound as to certain features of the premises where he altered the automobile numbers. As was said in *Glasser* v. *United States*, 315 U. S. 60, 80:

> It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

2. As noted above, there was only one issue in this case—the knowledge or intent with which petitioner received the stolen automobiles. Hesson's testimony that he had delivered the stolen Cadillac and that petitioner had later complained that not all of its identifying numbers had been changed was strong evidence to show that petitioner was well aware of the illegal way in which Hesson had obtained the vehicle. As such it was properly admissible even without the additional fact that, since the Oldsmobile allegedly received in count 1 was delivered as a partial replacement for the Cadillac, the facts as to the Cadillac were admissible as part of the whole transaction. *Nye & Nissen* v. *United States*, 336 U. S. 613, 618; *Michelson* v. *United States*, 335 U. S. 469, 475–476, fn. 8; *Williamson* v. *United States*, 207 U. S. 425, 450–451; *Harper* v. *United States*, 239 F. 2d 945, 946–947

(C. A. D. C.); *Herman* v. *United States*, 220 F. 2d 219, 224 (C. A. 4), certiorari denied, 350 U. S. 971; *McCormick* v. *United States*, 9 F. 2d 237, 238–239 (C. A. 8); *Degnan* v. *United States*, 271 Fed. 291, 293 (C. A. 2); cf. *Boyd* v. *United States*, 142 U. S. 450. Moreover, petitioner was acquitted on count 1, the only count to which the evidence concerning delivery of the Cadillac directly related.

Petitioner contends that other evidence of offenses not charged was also presented (Pet. 7). During the trial, F. B. I. agent Bell testified that he had interviewed petitioner several times while trying to trace automobiles stolen by Hesson. After testifying about the six vehicles named in the various counts, he was asked on cross-examination whether investigation revealed that petitioner himself attempted to conceal the cars and whether he did not sell to all who would buy (R. 119–121). In the course of this line of cross-examination, Mr. Bell said that "In addition to those six he sold several others that were also stolen, a total of twelve" (R. 121). Later, on re-cross examination, Bell testified that "there were three or four other cars interspersed with these that he's charged with, and after I went back the fourth or fifth time I told him that he didn't have to say anything to me if he didn't want to" (R. 124).

This testimony was not necessarily as to other offenses, for it did not suggest that petitioner knew at the time of receipt that the automobiles not included in the indictment were stolen. To the contrary, the fact that these automobiles were not included would permit the inference that there was no evidence of

such knowledge in those instances. Even if it is assumed that the evidence showed other crimes, defense counsel made no objection to these remarks by agent Bell and cannot complain now. *Thompson* v. *United States*, 245 F. 2d 232 (C. A. 5); *United States* v. *Pinna*, 229 F. 2d 216, 219 (C. A. 7); *Tinkoff* v. *United States*, 86 F. 2d 868, 878 (C. A. 7), certiorari denied, 301 U. S. 689.

3. Far from telling the jury that petitioner was "three-fourths guilty by admission" (Pet. 10), the judge merely instructed that there was only one issue in the case because of the stipulation. As to that issue, however, he carefully explained that petitioner was entitled to a verdict unless the fact finders were convinced beyond reasonable doubt of petitioner's guilty knowledge (R. 179–180).

Contrary to petitioner's present claim (Pet. 11), the trial judge gave a fair instruction on the effect to be given to evidence of good character, saying that it might generate a reasonable doubt of guilt (R. 180). The jury was also instructed that Hesson was an accomplice of petitioner "from his testimony, if you believe it, and if you do find that the witness Hesson took part in the commission of the unlawful acts for which this defendant is charged, his testimony is to be received by you with caution * * *" (R. 139). Since the jury first had to find that Hesson took part in the unlawful acts charged against petitioner, the instruction did not, as petitioner now claims (Pet. 12–13), have the effect of instructing the jury that the crime with which petitioner was charged had, in fact, been committed.

The judge did not instruct on the limiting effect to be given to evidence of an offense not charged, but as noted above, this evidence related to count 1 on which petitioner was acquitted. Moreover, at the trial, petitioner made no objection to the charge and did not request such an instruction. He is therefore precluded from claiming prejudice now. Rule 30, F. R. Crim. P. See *Ehrlich* v. *United States*, 238 F. 2d 481, 485 (C. A. 5); *United States* v. *O'Connor*, 237 F. 2d 466, 471–472 (C. A. 2); *Smith* v. *United States*, 230 F. 2d 935, 939 (C. A. 6).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1958.

U. S. GOVERNMENT PRINTING OFFICE 1958